IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY DIMEO, III,	:	
	:	
Plaintiff,	:	
	:	**No. 06-1544**
v.	:	
	:	
TUCKER MAX	:	
	:	
Defendant.	:	

DEFENDANT'S REPLY IN FURTHER SUPPORT OF
HIS MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

Pursuant to the Court's May 3, 2006 Order, defendant Tucker Max, by and through his undersigned counsel Montgomery, McCracken, Walker & Rhoads, LLP, respectfully submits this reply in further support of his motion to dismiss the Complaint with prejudice.

On or about April 25, 2006, plaintiff filed a single document that purports to be: (1) an opposition to defendant's motion to dismiss the Complaint; and (2) a motion for leave to amend the Complaint. In regard to plaintiff's opposition to the motion to dismiss, his omnibus pleading is replete with misstatements and mischaracterizations. For those reasons, as set forth in detail below, defendant respectfully submits this reply brief to address plaintiff's arguments.[1]

Plaintiff makes two arguments in an effort to save his defamation claim: (1) the Communications Decency Act ("CDA") does not provide immunity to defendant in this case because he exercised editorial control over "posts" on his Website; and (2) the Court is not

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[1] Defendant is filing a separate opposition to plaintiff's motion for leave to amend his Complaint.

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permitted, at this stage in the litigation, to determine whether the "posts" at issue are opinion or fact. Plaintiff is wrong on both counts.[2]

First, plaintiff argues that the express immunity provided by the CDA does not apply when a publisher of third-party "posts" exercises editorial control over the content of those "posts." *See* Plaintiff's Memorandum of Law at 2-5. Significantly, plaintiff does not cite a single case for that proposition – and for good reason; the case law, and the language of the CDA itself, stands for exactly the opposite. Moreover, this very argument now advanced by plaintiff has been rejected by federal and state courts, including the Third Circuit in *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003).

Under the CDA, a publisher of allegedly defamatory "posts" authored by third-parties is immune from liability. *See, e.g., Green*, 318 F.3d at 471; *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.C. Cir. 1998).

This is the case even when a publisher exercises editorial control over third-party "posts" by selecting which "posts" to publish and editing the content. *Batzel*, 333 F.3d at 1031 (holding that "'development of information' means something more substantial than merely editing portions of e-mail and selecting material for publication."); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (editing and altering stock quotations authored by third party does not turn defendant into an "information content provider" under the CDA); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41 (Wash. Ct. App. 2001) (holding

[2] Plaintiff's opposition to defendant's motion to dismiss addresses only the defamation claim asserted in the Complaint (Count I). Plaintiff does not contest that his Communications Act claim (Count II) or his punitive damages cause of action (Count III) should be dismissed. In fact, plaintiff has sought leave of Court to amend his Complaint in order to voluntarily dismiss Count II and add two new causes of action. Accordingly, this brief addresses only plaintiff's defamation claim.

Amazon immune from liability for negative comments "posted" on its website; even though it could edit "postings," that did not transform it into an information content provider).

That is exactly what the Third Circuit held three years ago:

> By its terms, [47 U.S.C.] § 230 provides immunity to ... a publisher or speaker of information originating from another information content provider. The provision **"precludes courts from entertaining claims that would place a computer service provider in a publisher's role,"** and therefore bars **"lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional functions – such as deciding whether to publish, withdraw, postpone, or alter content."**

Green, 318 F.3d at 471 (emphasis in original) (quoting *Zeran*, 129 F.3d at 330).

Similarly, the New Jersey Superior Court addressed – and also rejected – the identical argument now advanced by plaintiff. *See Donato v. Moldow*, 865 A.2d 711 (N.J. Super. 2005). In fact, plaintiffs' allegations in that case are substantively identical to those in this case:

- Plaintiffs in *Donato* alleged that defendant "was more than passive in his role as publisher, and has 'actively participated in selective editing, deletion and re-writing of anonymously posted messages" on defendant's website. *Id.* at 716.

- Plaintiff here alleges that defendant "*solicits* content that Defendant then reviews, presumably edits, and then *actively* re-transmits via the site if consistent with Defendant's nefarious objectives." Plaintiff's Memorandum of Law at 3 (emphasis in original).

After undertaking a comprehensive review of federal and state cases that had addressed this issue, the *Donato* court held that defendant was immune from liability regardless of his conduct in selecting and editing "posts" by third-parties:

> Our canvas of the decisions interpreting and applying § 230 reveals a common thread. The provision has received a narrow, textual construction, not one that has welcomed creative theories or exhibited judicial creativity. Following this approach and applying these principles to this case before us, we are satisfied that [defendant], by virtue of his conduct, cannot be deemed an information content provider with respect to the anonymously-posted defamatory statements. His status as a provider or user of an interactive computer service garners for him the broad general immunity of § 230(c)(1).... That [defendant] posts messages of his own and participates in the discussion does not make him an information content provider with respect to his postings.... [Plaintiffs] claim that [defendant]

> controlled the content of the discussion forum, thus shaping it, as a result of which he transformed into an information content provider. He accomplished this, according to [plaintiffs], by selectively choosing which messages to delete and which to leave posted. These activities, however, are nothing more than the exercise of a publisher's traditional editorial functions, namely whether to publish withdraw, postpone or alter content provided by others. **This is the very conduct Congress chose to immunize by § 230.**

Donato, 865 A.2d 725-26 (emphasis added). The court further determined that defendant "should not be exposed to the risk of liability because he has established his own standards of decency; nor is he potentially liable because of the degree of success he achieved or the effort he exerted to enforce them." *Id.* at 726.

The argument now advanced by plaintiff contradicts all of the case law cited in this brief, as well as that cited in defendant's Motion to Dismiss. He has offered no case to support his position, which repeatedly has been rejected by state and federal courts. Accordingly, this Court should reject plaintiff's argument and find that the CDA provides immunity to defendant in this case.

Plaintiff's second argument in support of his defamation claim is that a jury – not the Court – must decide whether the "posts" at issue are opinion or fact.[3] *See* Plaintiff's Memorandum of Law at 4-5. This too is a misstatement of the law. Under Pennsylvania law, the Court decides, when considering a motion to dismiss, whether the statements at issue are capable of defamatory meaning. *See, e.g., Constantino v. Univ. of Pittsburgh*, 766 A.2d 1265, 1270 (Pa. Super. 2001); *Mathias v. Carpenter*, 587 A.2d 1, 3 (Pa. Super. 1991).

Because expressions of opinion are **not** capable of defamatory meaning, it is the Court's duty to consider the statements in the first instance and decide whether or not they are opinion or fact. *Id.* Indeed, the Pennsylvania Superior Court has expressly held that, "[w]hether a particular statement constitutes a fact or opinion is a question of law for the trial court to determine." *Dougherty v. Boyertown Times*, 547 A.2d 778, 785 (Pa. Super. 1988). If opinion, the statements cannot, as a matter of law, be defamatory because they are protected by the First Amendment. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 30 (1990); *Beverly Enter., Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999); *Constantino*, 766 A.2d at 1270; *Mathias*, 587 A.2d at 3.

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[3] Plaintiff also claims that the "posts" at issue in this case constitute "libel *per se*." Plaintiff's Memorandum of Law at 5. Pennsylvania no longer recognizes the concept of "libel *per se*." *Agriss v. Roadway Express, Inc.*, 483 A.2d 456,468-74 (Pa. Super. 1984). Again, plaintiff has mischaracterized the law.

Here, the Court can, and should, determine whether the "posts" are, on the one hand, expressions of opinion, rhetorical hyperbole or mere insults, or, on the other hand, statements of fact. Based on the "posts" themselves, it is clear that they are not factual, but are non-actionable, constitutionally protected expressions of opinion and/or rhetorical hyperbole. For these reasons, the Court should grant defendant's motion to dismiss plaintiff's defamation claim.

Should the Court dismiss the Complaint, defendant respectfully requests that sanctions, in the form of defendant's attorney's fees, costs and expenses in having to defend this case, be levied against plaintiff.

Since March 28, 2006 – five days after defendant's counsel received the Complaint and before the case was removed to this Court – plaintiff has known that his claims were baseless. On that date, defendant's attorney sent a letter to plaintiff's counsel describing the express immunity provided by the CDA, citing the relevant case law, and asking plaintiff to withdraw his defamation claim (Count I). Exhibit A, March 28, 2006 letter from Michael K. Twersky to Matthew B. Weisberg. The letter further explained that plaintiff's Communications Act claim (Count II) also was deficient because it is based on a criminal statute that does not provide a private cause of action, and his punitive damages cause of action (Count III) was not a cause of action at all, but rather a remedy available only upon a finding of liability for a recognized claim. *Id.*

In response, plaintiff's counsel asked for an extension of time to review the cases cited and consider his options. Exhibit B, April 1, 2006 e-mail from Matthew B. Weisberg to Michael K. Twersky. Plaintiff's counsel, however, never responded to the substance of the March 28, 2006 letter. Consequently, defendant was forced to incur fees and expenses in (1) removing the case to federal court; (2) preparing and filing a motion to dismiss; (3) responding to plaintiff's petition to remand; (4) responding to plaintiff's motion for leave to amend his Complaint; and (5) preparing this reply brief. None of those expenses would have been incurred if plaintiff had voluntarily dismissed the case. Indeed, only now – while the motion to dismiss is pending – has plaintiff agreed to dismiss his Communications Act claim (Count II). *See* Plaintiff's Memorandum of Law at 5-6.

Both the inherent powers of the Court and federal statute allow the imposition of sanctions against a party or his attorney where they have acted in bad faith. *See, e.g., In re Prudential Ins. Co. Sales Prac. Litig.*, 218 F. 3d 175 (3d Cir. 2002); 28 U.S.C. § 1927.[4] The Third Circuit has described the circumstances under which sanctions may be awarded:

> Before a court can order the imposition of attorneys' fees . . . it must find willful bad conduct on the part of the offending attorney. Indications of this bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing . . . was an improper purpose such as harassment.

In re Prudential, 278 F.3d at 188 (internal citations omitted).

All of the elements identified by the Third Circuit are present here. Plaintiff was informed that his claims lacked merit and defendant provided him with citations to the cases showing just that, including a Third Circuit decision. Thus, plaintiff knew – or certainly should have known – that his claims were contrary to existing law and binding authority.

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[4] 28 U.S.C. § 1927, entitled "Counsel's liability for excessive costs," provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

By dismissing his Communications Act claim, plaintiff acknowledges that it lacked merit from the very beginning. Yet he refused to voluntarily dismiss it until after defendant filed his motion to dismiss, even though he was advised well before that that the claim was improper. Plaintiff can offer no legitimate reason for this conduct.

Defendant believes the same holds true for plaintiff's defamation claim – he was advised that his claim was meritless, directed to the relevant case law and asked to withdraw it. He refused, and now advances arguments in support of that claim that have been rejected by state and federal courts, including the Third Circuit, and are contrary to Pennsylvania law. Again, there can be no legitimate reason for such conduct.

Therefore, defendant seeks sanctions against plaintiff for having to defend a case that rightfully should have been dismissed voluntarily more than a month ago – before defendant incurred significant expenses and before the Court was forced to deal with this matter.

Respectfully submitted,

Dated: May 8, 2006

MT 829

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EXHIBIT A

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March 28, 2006

BY FACSIMILE
AND REGULAR MAIL

Matthew B. Weisberg, Esquire
Prochniak Poet & Weisberg, P.C.
7 South Morton Avenue
Morton, PA 19070

Re: DiMeo v. Max, March Term, 2006, No. 1576
Philadelphia County Court of Common Pleas

Dear Mr. Weisberg:

This law firm represents the defendant, Tucker Max, in the above-captioned litigation. This letter serves as notice pursuant to Rule 1023.1 of the Pennsylvania Rules of Civil Procedure that the claims set forth in the Complaint filed by your client, Anthony DiMeo III, have absolutely no basis in law and are without merit. Therefore, we demand that your client voluntarily dismiss his Complaint with prejudice by April 3, 2006. If your client refuses to comply with this demand, we intend to seek all appropriate relief and sanctions available.

The Complaint alleges that Mr. Max defamed plaintiff and violated a federal statute based on information that appeared on Mr. Max's Internet website. *See* Complaint at ¶¶ 5, 13-14. As a result, plaintiff has asserted three separate causes of action against Mr. Max, none which are cognizable under Pennsylvania or federal law.

First, as you must aware, section 230(c) of the Communications Decency Act ("CDA") provides "immunity to ... a publisher or speaker of information originating from another information content provider. The provision '**precludes courts from entertaining claims that**

would place a computer service provider in the publisher's role,' and therefore bars **'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content.**'" *Green v. American Online*, 318 U.S. 465, 471 (3d Cir. 2003) (emphasis in original) (citations omitted).

The Third Circuit is not alone in holding that the CDA provides immunity from tort liability to mere "publishers" of information, like Mr. Max, who post information created by third parties. *See, e.g., Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44 (D.C. Cir. 1998); *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Although you did not attach the offending statements to the Complaint, which is required under Pennsylvania law, even a cursory review of those statements reveals that they are "messages" posted on a "message board" maintained on Mr. Max's website. Mr. Max, as the computer service provider, did not "create" any of the "messages" identified in the Complaint, and, therefore, he is immune from liability for any tort, including defamation, as a result of the "messages."

Second, aside from the obvious constitutional problems that arise from the allegations that Mr. Max violated the Communications Act of 1943, Count II of the Complaint, like Count I, is riddled with flaws. As an initial matter, 47 U.S.C. § 233(a)(1)(c) does not provide a private right of action for your client. To the contrary, that provision of the Communications Act provides only for criminal sanctions and civil fines by the Federal Communications Commission, not civil actions by private citizens. Consequently, plaintiff is prohibited from proceeding with his civil claim alleging a violation of that federal statute. Moreover, the offending "messages" were not sent to plaintiff by Mr. Max; rather, they were created by third parties and posted on a "message board" maintained by Mr. Max. Indeed, it seems likely that plaintiff took affirmative steps to locate and read the offending "messages" from Mr. Max's website, and then sued him without ever actually "receiving" the messages from my client. In addition, and yet another independent reason why Count II is fatally flawed, 47 U.S.C. § 233(a)(1)(c) does not apply to "interactive computer services" such as Mr. Max's "message board." *Id.* at § 233(h)(1)(B) and (h)(2). For all of these reasons, Count II of the Complaint is without merit.

Finally, Count III, styled as a claim for "Punitive Damages," is not a cause of action but a request for a specific type of relief. Accordingly, it cannot stand alone and is incorporated, if anywhere, as part of plaintiff's defamation claim, which itself is improper given the immunity provision of the CDA.

As you are well aware, your signature on the Complaint and Verification "constitutes a certificate that … the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law [and that] the factual allegations have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Pa. R. Civ. P. 1023.1(c)(2) and (3); *see also* Fed. R. Civ. P. 11(b) (similar standard).

It is obvious that you cannot meet that standard and that this case should never have been filed. Indeed, given the relationship between plaintiff and Mr. Max, it is clear that this litigation was instituted solely "for an[ ] improper purpose, such as to harass" Mr. Max and force him to spend time and money defending against plaintiff's frivolous claims. *See* Pa. R. Civ. P. 1023.1 (c)(1). Therefore, under the Pennsylvania Rules of Civil Procedure we demand that your client dismiss this action with prejudice by no later than April 3, 2006. If your client fails to comply with this demand, we intend to seek appropriate sanctions as provided under Pennsylvania law against all culpable parties.

Sincerely,

Michael K. Twersky

EXHIBIT B

Twersky, Michael

From: Matthew B. Weisberg [mweisberg@ppwlaw.com]

Sent: Saturday, April 01, 2006 12:20 PM

To: Twersky, Michael

Subject: Dimeo v. Max

Thank you for your correspondence of March 28, 2006.

Unfortunately, I am just now able to review.

I would appreciate a reasonable extension from your April 3 deadline so that I may more extensively review your contentions. Unless I hear otherwise, I will assume this extension is granted.

Thank you for your courtesies.

Matthew B. Weisberg, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2006, a true copy of the foregoing Defendant's Reply in further Support of his Motion to Dismiss the Complaint with Prejudice was sent by First Class U.S. Mail, postage prepaid, to the following:

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